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# TRINITY ASSOCIATES

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Historical Studies • Environmental Planning • Site Analysis • Public Trust Research

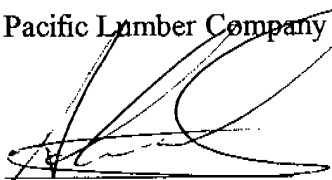
DATE: November 13, 1998

TO: Bruce Halstead  
United States Fish & Wildlife Service  
1125 16th Street, Room 209  
Arcata, CA 95521

RE: Pacific Lumber Company Habitat Conservation Plan  
Permit Numbers PRT-828950 and 1157

TO: John Munn  
California Department of Forestry  
1416 Ninth Street  
Sacramento, CA 95814

RE: Pacific Lumber Company SYP 96-002

FROM:   
Aldaron Laird  
Environmental Planner



*Pacific Lumber Company (PL) proposes to extract gravel from river bars in the Eel River upstream from the confluence of the Van Duzen and Eel rivers. PL received a determination of vested rights from Humboldt County in 1993 to mine gravel from 11 different gravel bars, on 26 different parcels, on property owned or leased by PL located along 25 miles of the Eel River. This vested right recognized an annual extraction of a maximum of 160,000 cubic yards from all gravel bars, which were considered as one operation with no more than 30,000 cubic yards to be mined on any one bar in any given year.*

*PL in its HCP alludes to these 11 different gravel bars, on 26 different parcels located along 25 miles of the Eel River as a Timber related activity rather than as commercial*

*instream mine operations, which they are in fact, and unbelievably propose mining 25 miles of the Eel River as mitigation for effects from their logging roads to aquatic environments.*

*The HCP provides no discussions of direct, in-direct or cumulative impacts to anadromous salmonids, their habitat, or impacts to the succession of Riparian habitat, from its instream mining.*

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*The HCP proposes no mitigation measures under PL's control.*

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*The HCP provides no discussion of alternative gravel extraction sites, such as rock quarries to its instream gravel mining sites on 11 different gravel bars, along 25 miles of the Eel River.*

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*The HCP does not specifically describe the Plan and Permit Area rather it lumps its discussion of PL's gravel mining from 11 different gravel bars, on 26 different parcels along 25 miles of the Eel River together in an attempt to gloss over the magnitude of its commercial instream gravel extraction operations and the potential significant cumulative adverse effects. In addition, no mention is made in PL's HCP of its numerous small instream mining sites located in tributaries where active logging is planned or under way, such as in the early 1990s at Yaeger Creek, that annually extract approximately 1,000 cubic yards per site.*

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*The HCP defers all discussion of site descriptions, covered activities, baseline conditions, potential direct in-direct and cumulative effects, alternatives, mitigation measures, and monitoring to the 1996 Army Corps of Engineers' (COE) Humboldt County Letter of Permission (LOP) and 1997 Section 7 Incidental Take Statement/Biological Opinion (BO) from National Marine Fisheries Service (NMFS). But, the 1996 COE's LOP Environmental Assessment document did not describe PL's 11 instream gravel mining sites rather it lumped all instream gravel mining in Humboldt County into either large operations greater than 5,000 cubic yards or small operations under 5,000 cubic yards. The COE issued a Finding of No Significant Impact (FONSI)*

*based on this programmatic type impact assessment for all of Humboldt County and provided no detailed analysis of PL's 11 instream gravel mining sites.*

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*The heart of the COE's LOP is to defer environmental assessment, particularly cumulative impact assessment and development of mitigation measures to the judgment of an Advisory Committee (CHERT) that serves at the discretion of the Humboldt County's Board of Supervisors for all instream mining in the County. Yet, the COE has stated repeatedly that they are not bound by any recommendations from CHERT, and that they retain their authority to regulate gravel extraction in accordance with Section 404 of the CWA. In fact, recently due to "political turmoil" the COE in 1998 initiated an amendment to its LOP to do away with CHERT's oversight and allow mining operators to hire a third party to review their proposed annual mine plans. Also in 1998 Humboldt County's Board of Supervisors supported an appeal of CHERT's decision to limit gravel mining on the Mad River, and allowed gravel operators to mine in excess of CHERT's recommended volume.*

*PL's HCP defers all discussion of what mitigation measures it will employ to what ever the COE will require presumably based on the COE's Incidental Take Statement and BO received from NMFS in 1997. However, that BO states that "Corps retains the right to add or modify conditions as appropriate." So even NMFS year to year will have no prior knowledge of what the COE may modify or what effect it may have on coho salmon with out the COE's re-initiating Section 7 Consultation. The B.O. also does not spell out specific mitigation measures for PL's 11 instream mining sites, it relies on CHERT to provide a comprehensive review and to mitigate instream mining impacts.*

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*Recently, the federal Court of Appeals in Washington D.C. decision National Mining Association V. U.S. Army Corps of Engineers, No. 97-5099(D.C. Cir. June 19, 1998) has ruled that the COE's and the Environmental Protection Agency overstepped their authority when they adopted rules to regulate excavation in wetlands. The COE only began to claim authority to regulate instream gravel mining under Section 404 after 1993. If the COE loses its authority to regulate instream gravel mining PL will not be*

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able to rely on the COE's Section 7 Incidental Take Statement to comply with the federal Endangered Species Act, and its proposed covered activities in its Section 10 Incidental Take Permits will not be specific enough to address the impact and mitigation from its commercial instream mining at 11 different sites along 25 miles of the Eel River.

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*In summary, PL's HCP does not provide any discussion of its mitigation measures for impacts from its commercial instream mining. All mitigation is deferred, principally to what ever the COE requires PL to implement. Yet, the COE's can not describe what its mitigation measures will be either because they will be developed by an advisory committee to Humboldt County during their annual review. So at this time it is not possible to provide meaningful input on as yet undeveloped mitigation measures for PL's instream mining impacts. Further, if the COE loses its authority to regulate instream gravel extraction under Section 404 PL's HCP has not sufficiently discussed its 11 gravel mining site conditions, direct impacts, in-direct impacts, cumulative impacts, alternatives, mitigation measures nor a monitoring program.*

*Should PL's HCP have to stand alone for its commercial instream gravel mining operations it would fail to meet the mandatory elements for a HCP.*

*A brief analysis of PL's HCP, in Italic font, of PL's HCP follows:.*

# **1. HCP CONSIDERATIONS (PALCO SYP.HCP VOLUME 1)**

[Page 3]

PALCO is seeking authorization for incidental take from USFWS and NMFS pursuant to Section 10(a) of the federal ESA and from CDFG pursuant to Sections 2081, 2090, and 2835 of the FGC. For purposes of the ITPs, the Plan:

3. Identifies alternatives to the taking and the reasons why the alternatives were not employed;

*No alternatives to PL's proposed commercial instream mining operation or sites were developed.*

4. Examines the impacts of the proposed take on the species;

*The HCP defers all discussion of impacts to the COE's LOP its NEPA document, and NMFS Section 7 Incidental Take Statement/Biological Opinion.*

*Humboldt County as the local lead agency under the State's Surface Mine and Reclamation Act (SMARA) prepared a Program Environmental Impact Report (PEIR) for Instream Gravel Mining on the lower Eel River in 1992. The PEIR determined that the existing and proposed commercial instream gravel mining had the potential to create long-term lowering of the bed of the river resulting in a significant adverse cumulative impact to the environment. The cumulative impact was of particular concern to the infrastructure such as bridges and levees on the lower Van Duzen and Eel Rivers. PL's 11 commercial instream gravel mining sites and its 160,000 cubic yard extraction per year is in addition to the mining sites included in the PEIR.*

5. Identifies measures to minimize and mitigate impacts;

*The HCP defers all discussion of mitigation measures to the COE's LOP its NEPA document, and NMFS Section 7 Incidental Take Statement/Biological Opinion.*

*The PEIR in 1992 determined that in order "To minimize and control potential significant adverse effects from lowering the river bed due to over-extraction, a River Management Plan must be adopted." This mitigation measure, 6 years later, has still not been developed by Humboldt County for the lower Eel River. PL's HCP also proposes to implement no new mitigation measures.*

## **2. SCOPE OF THE PLAN (PALCO SYP.HCP VOLUME 1)**

[Page 5]

### **a. Plan and Permit Area**

The Plan Area for this SYP/HCP is defined as PALCO's ownership as it is anticipated to exist on and following the effective date of the ITPs.

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*Fee title to this section of the Eel River, a navigable waterway is subject to the State's interest, between the "ordinary low water" marks, as sovereign upon its admission into the Union, and retains Public Rights up to the "ordinary high water" mark under the Public Trust Doctrine. These Public Rights are an easement that effect private land use even though the State may have conveyed a naked fee title interest in some locations to a private party. As this section of the Eel river has a very mobile bed, the exact location of the State's interest and therefore PL's as a riparian property owner is not known, nor discussed in the HCP. Of particular significance is the failure of PL's HCP to describe the direct, in-direct or cumulative effects of its commercial instream gravel mining at 11 instream gravel mining sites along 25 miles of the Eel River to the Public's Rights under the Public Trust Doctrine.*

### **3. COVERED ACTIVITIES (PALCO SYP.HCP VOLUME 1)**

[Page 9]

Subject to the conditions and restriction identified in this Plan and specified in the ITPs, activities covered by the authorizations for incidental take will include:

Gravel extraction operations at specific locations;

*The HCP does not describe the location or baseline conditions of PL's 11 commercial instream gravel mining sites and bars, along 25 miles of the Eel River. In addition PL has in the past extracted gravel from numerous sites within tributaries of the Eel river. These multiple sites in the past have been lumped into one CDFG FGC 1603 Agreement for each tributary. Humboldt County has treated these gravel mining sites as exempt under SMARA even though the State's Department of Conservation Division of Mines and Geology has not approved such an exemption in Humboldt Counties Mining Ordinance. Yet PL's HCP makes no mention of these numerous small gravel mine sites in tributaries to the Eel river that support coho salmon.*

c. Near-Stream Gravel Mining

PALCO currently conducts surface mining operations to extract gravel aggregate from river bar deposits in the Eel River upstream from the confluence of the Van Duzen and Eel Rivers. These activities are conducted under an existing permit from Humboldt County and a Letter of Permission (LOP) from the U.S. Army Corps of Engineers (COE). In accordance with Section 7 of the federal ESA, COE completed an interagency consultation with NMFS, and NMFS produced a Biological Opinion regarding the effects of the LOP on listed fish species.

*Specifically, PL commercially mines gravel from 11 different bars over 25 miles of the Eel river, as well as numerous sites on tributaries to the Eel river. PL is not mining gravel "Near Stream" it is actively extracting the bed of the Eel river, it is not "near" but in the bed of the river, below the "ordinary high water" level. No discussion of impacts from PL's instream gravel mining to listed species or their habitat is provided in this HCP all discussion is deferred to the COE's LOP its NEPA document, and NMFS Section 7 Incidental Take Statement/Biological Opinion, which also does not describe PL's commercial instream gravel extraction sites or operations.*

PALCO's existing LOP (#21641N) was issued last in October 1996 for an effective period of three years or until December 31, 1999. Consistent with the LOP, a maximum of 160,000 cubic yards per year may be extracted from the several bars comprising the Eel River operations; no more than 30,000 cubic yards can be removed from each bar each year; and no extractions are allowed in the wetted channel. In each of the three years covered by the LOP, PALCO must produce engineered cross-sections of the relevant gravel bars or deposit sites before and after extraction operations (if any). Extraction volumes are limited to amounts recruited and deposited each winter and constrained by the maximum permitted extraction volumes. Impacts of gravel extraction are minimized, mitigated, and monitored in accordance with measures reviewed by the County of Humboldt Extraction Review Team (CHERT) and approved by the various permitting agencies.

*This HCP proposes that limiting gravel extraction to 30,000 cubic yards at each bar will mitigate PL's instream gravel mining impacts to listed species or their habitat. Yet no baseline data is provided for PL's 11 bars or specific instream gravel mining plans for these sites, to substantiate this position. Again this HCP defers to the COE's LOP its NEPA document, and NMFS Section 7 Incidental Take Statement/Biological Opinion, which do not describe PL's 11 bars or its proposed commercial gravel extraction operations.*

For purposes of this Plan, it is assumed that

Mitigation and monitoring requirements under any future renewal of the LOP will be the same or similar to current requirements; and

*This also assumes that the COE's will retain full regulatory authority over all aspects of PL's instream gravel mining operations. Should the COE return to only regulating fill and not dredging activities as it did before 1993, only the footprint occupied by fill for PL's low water bridge approaches will be covered under its Section 7 Incidental Take Statement/Biological Opinion, not extraction location, depth, width, slope or volume. Further, this assumes that Humboldt County will continue to have CHERT serve at the pleasure of the BOS, or that the COE or the BOS will adhere to CHERT's recommendations.*

PALCO will comply with the measures required as conditions of the COE LOP or permit.

*The COE can not enforce conditions outside of its regulatory jurisdiction, i.e. outside the area covered by "ordinary high water" or if the recent federal Appellate Court decision stands for activities not involving the addition of a pollutant to the waters of the U.S. So mere compliance with the COE LOP may not be sufficient to cover all of PL's activities associated with its commercial instream gravel mining..*

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#### 4. THE AQUATIC PLAN (PALCO SYP.HCP VOLUME IV)

##### 1.1 MANAGEMENT IMPACTS ON FISH SPECIES WITHIN PL'S OWNERSHIP

##### 1.1.3 Rock and Gravel Mining

[Page 6-7]

An integral element of PL's business operations involves the mining and extraction of hard rock products from upland outcrops quarries and river-run aggregate from near-stream alluvial deposits along the middle reaches of the Eel River. These operations also constitute an essential component of the mitigations and aquatic resource conservation measures provided in the Plan for the control of sediment from roads and other sources. Rocked roads have a much lower potential to deliver fine sediments from roads and other sources. Consequently, without the assurances provided by coverage and inclusion of PL's rock and aggregate mining activities within the Incidental Take Permit, PL cannot practicably commit to implement the road sediment control mitigations described in the Plan.

*The logic that NMFS must allow the extraction of gravel from coho salmon critical habitat along 25 miles of the Eel River to rock PL's roads to prevent siltation to coho salmon critical habitat in forested tributaries is amazing! There is no quantitative analysis presented in this HCP to justify degrading critical habitat in one area to mitigate impacts to critical habitat in another. There is no net gain for coho salmon under such a scheme, only a net loss of critical habitat!*

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Near Stream Gravel Mining [page 8-9]

PL currently conducts surface mining operations to extract gravel aggregate from river bar deposits in the Eel River upstream from the confluence of the Van Duzen and Eel Rivers. PL's existing permit allows for maximum extraction of 160,000 cubic yards per year from several bars; no more than 30,000 cubic yards can be removed from each bar each year, and no extractions are allowed in the wetted channel. Specific annual mining

plans and extraction limits are based upon aggregate recruitment and deposition as established by engineered cross-section and other monitoring procedures, as specified by U.S. Army Corps of Engineers (COE) review.

*The act of surveying cross sections on the Eel River is not mitigation in and of itself, but rather an environmental description for site planning or mitigation measure monitoring. Aggregate recruitment can not be determined unless the preceding years surface topography was surveyed. A re-survey and comparison of the same bar next year after winter high flows will establish recruitment. However, this does not address what the appropriate baseline morphology should be to protect river form that in turn provides coho salmon their critical habitat. Based on PL's vested rights they are able to excavate up to 30,000 cubic yards at a bar per year, is this what is proposed?*

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Potential impacts of gravel mining include: creation of holes in which fish could become stranded, excessive extraction could affect river morphology, and trucks and gravel extraction could prevent establishment of willows and other riparian vegetation. PL believes impacts of its gravel mining on fish and wildlife, as mitigated, are minimal. A National Environmental Policy Act review of the U.S. Army Corps of Engineers letter of permission (LOP) process resulted in a Finding of No Significant Impacts. This, in turn, led to a National Marine Fisheries Service Biological Opinion that concluded any take of coho salmon incidental to permitted gravel extraction would not jeopardize the species. Based on that Biological Opinion, NMFS issued an Incidental Take Statement for the permitted gravel mining activities.

*PL's HCP ignores the potential cumulative long-term adverse environmental impact from its instream mining compounding the effects to downstream mining of at least 9 other gravel mining operations. The geomorphic effects from PL's instream mining has not be assessed in this HCP. PL has provide no mitigation measures that they will fund, implement, or monitor other than what ever the COE requires under its LOP, and these are not specified in the LOP, but are to be developed annually by CHERT, only as long as CHERT continues to serve the Humboldt County Board of Supervisors, and only as*

*long as the COE accepts their recommendations. Further, should the COE's authority under Section 404 be reduced to what it was prior to 1993 they will not have sufficient jurisdiction to enforce all of the mitigation measures currently in the LOP's BO. Yet, PL has provided no alternative mitigation plan to replace the COE's LOP or CHERT functions should this happen. PL has also not provided any measures of threshold of significance to say its impacts are minimal. Indeed PL has not even described were it is going to be conducting its commercial instream mining operations or the baseline conditions of these bars. NMFS's BO issued to the COE was not specific to and did not describe PL's 11 instream mining sites along 25 miles of the Eel River.*

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PALCO's LOP (#21641N) was issued last in October 1996 for an effective period of three years or until Dec. 31, 1999. While the permit is effective for a period of years, each year permittees are required to conduct engineered cross-sections of the relevant gravel bars or deposit sites, both before and after extraction operations, if any, each year. Extractions volumes are limited to amounts recruited and deposited each winter, constrained by the maximum permitted volumes described above.

*Limiting gravel extraction volumes to what is recruited implies that maintaining the geomorphic status quo is desirable for the conservation of coho salmon. No baseline data is provided in PL's HCP for their 11 sites. What year's surface morphology will be used to establish a baseline, and why, to measure recruitment? It is not possible at this time to determine if the status quo is conducive to the conservation of coho salmon at PL's 11 sites.*

In addition, PALCO's LOP is accompanied by an assortment of mitigation and monitoring requirements as detailed below.

PALCO has been expressly required, as an initial matter, to "make every reasonable effort to conduct activities authorized in a manner that will minimize any adverse impact of the work on water quality, fish and wildlife, and the natural environment, including adverse impacts to migratory waterfowl breeding areas, spawning areas, and riparian areas.

*These mitigation measures are not specific to PL's 11 sites nor do they have any measurable or enforceable standards. PL has not described what its instream mining activities will be, nor what the natural environment is at these sites.*

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No authorization will be granted under the LOP procedure for any activity that is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Endangered Species Act, or that is likely to destroy or adversely modify the critical habitat of such species.

*Again PL is deferring to another entity to conserve coho salmon and proposes nothing in its HCP that PL will fund, implement and monitor.*

## 1.2 AQUATIC HABITAT CONSERVATION MEASURES TO BE IMPLEMENTED UNDER THE PLAN

### 1.2.3 HCP Mitigation Measures for Rock and Gravel Mining

#### Near Stream Gravel Mining

[page 41-42]

Mining is already highly regulated by several agencies. Therefore, no new HCP measures are proposed here. The conclusion that no additional mitigation measures are needed is supported by NMFS issuance of an Incidental Take Statement covering PL gravel extraction operations.

*Humboldt County has recognized PL's vested rights, it can not regulate PL's instream mining operations if PL limits itself to 160,000 cubic yards annually at these 11 sites along 25 miles of the Eel River. Humboldt County can only regulate the reclamation of the bar surface after mining has occurred. The California Department of Fish and Game's 1603 FGC is only an Agreement subject to arbitration, and the COE may revert back to regulating only fill as in stockpile location and footprint or low water bridge approach fills.*

*The NMFS in its listing of coho salmon found that existing regulatory schemes are not working! Impacts to coho salmon from PL's commercial instream gravel mining operations are PL's responsibility. PL's HCP should list all of the regulatory measures that it complies with that will conserve coho salmon at its 11 sites on the Eel River.*

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In-stream damage due to gravel extraction is mitigated by removing gravel using the gravel bar skimming method.

*Skimming as a mining method may have less or different impacts to stream morphology than other mining methods. However, the location, volume, depth, slope and width of a gravel extraction operation even if skimming is employed needs to be assessed for impacts to stream morphology. Changes in the width-depth ratio, and slope of a stream channel caused by lowering bar elevation from mining can have a significant effect on stream form, and its aquatic habitat.*

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Impacts to riparian zones are minimized by trucks using only established road corridors to access the mining areas. In the case that proposed activities would disturb riparian vegetation, the area would require additional delineation (mapping), identification, description and proposed mitigation measures. This generally requires input from a qualified botanist. Such information is then subject to review by the County of Humboldt Extraction Review Team (CHERT) and by the various permitting agencies (CDFG, COE, Humboldt County) which may or may not approve such plans. If proposed mitigation is not deemed adequate, then extraction plans may be altered to achieve avoidance. In addition to this case by case mitigation, ongoing mitigation is guided by the COE letter of permission (LOP). The COE LOP process includes monitoring procedures and success standards for mitigative revegetation. In essence, mitigative revegetation may need to be monitored over the course of several seasons, as provided to achieve success.

*Impacts to riparian zones occurs from the skimming of a bar surface. Riparian vegetative succession starts with freshly disturbed areas as high water recedes and progresses toward maturity at the river's floodplain. Constant skimming of a bar surface following high water prevents serial stage of riparian vegetation from being established.*

*Using established road corridors does nothing to conserve riparian habitat from mining the bar's surface from the water's edge to the floodplain.*

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### 1.3 ANTICIPATED EFFECTS OF HCP MITIGATION MEASURES

#### 1.3.2 Anticipated Effectiveness of HCP Mitigation Measures for Rock and Gravel Mining

##### Near Stream Gravel Mining

[page 81]

Mining is already highly regulated by several agencies. Due to the fact that riparian mitigations are agency regulated, gravel mining is expected to have no negative impacts on this resource. Our conclusion that mitigation measures for fisheries are sufficient is supported by NMFS issuance of an Incidental Take Statement covering PL's gravel extraction operations.

*PL's HCP does not provide any discussion of its commercial instream mining operations regarding what PL will do over the life of its Incidental Take permits to conserve coho salmon, all of the mitigation measures proposed are deferred to others to require and enforce.*

#### REFERENCES

1. July, 1992. Humboldt County Public Works Department, Natural Resources Division. "Final Program Environmental Impact Report on Gravel Removal from the Lower Eel River".
2. August 19, 1996. U.S. Army Corps of Engineers, San Francisco District, Permit Evaluation and Decision Document for "Proposed Letter of Permission (LOP) procedure, Gravel Mining and Excavation Activities within Humboldt County."

3. *August 19, 1996. U.S. Army Corps of Engineers, San Francisco District. PUBLIC NOTICE "Letter of Permission Procedure Gravel Mining and Excavation Activities within Humboldt County." LOP 96-1*
4. *May 16, 1997. National Marine Fisheries Service, Southwest Region. Biological Opinion for U.S. Army Corps of Engineers, San Francisco District. "Letter of Permission Procedure to Permit Gravel Mining in Humboldt County" and Incidental Take Statement*
5. *May 4, 1998. U.S. Army Corps of Engineers, San Francisco District. PUBLIC NOTICE "Proposal to Modify the Letter of Permission Procedure 96-1 for the Authorization of Work in Humboldt County"*
6. *June 19, 1998. U.S. Court of Appeals for the District of Columbia Circuit. No. 97-5099. "National Mining Association, et al., v. U.S. Army Corps of Engineers, et al.". known as the "Tulloch Appeal"*
7. *September 28, 1998. Department of the Army, San Francisco District, Corps of Engineers. "Letter of Modification" to Permit No. 21062N, Bill O'Neill of Arcata Redimix, Arcata, California*
8. *October 9, 1998. Board of Supervisors, County of Humboldt County, State of California. "Action on Appeal of the County of Humboldt Extraction Review Team (CHERT) 1998 Mad River Gravel Extraction Recommendations"*